

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MARIO RODRIGUEZ,

Defendant and Appellant.

G039345

(Super. Ct. No. 06NF1880)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gregg L. Prickett, Judge. Affirmed.

David L. Polsky, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Steve Oetting and Eric A. Swenson, Deputy Attorneys General, for Plaintiff and Respondent.

Mario Rodriguez appeals from a judgment after a jury convicted him of two counts of second degree robbery and street terrorism, and found true street terrorism enhancements. He argues insufficient evidence supports the jury's finding on the street terrorism enhancements, the trial court erroneously admitted the gang expert's testimony because it was without evidentiary support, and the prosecutor committed misconduct, or alternatively, his defense counsel was ineffective for failing to object to the prosecutor's questions and argument. None of his contentions have merit, and we affirm the judgment.

FACTS

Fifty-six-year-old Shumei Wang left the Anaheim Nice Food Restaurant and on the way to her car, she walked in front of Ben and Maria Crespín as they sat in their car. A second car containing several people, and with a cracked windshield, drove in the opposite direction and stopped. A man got out of the car, and from behind took Wang's purse from her shoulder, which caused her to spin around. She screamed and chased the man, who got back into the car's rear driver's side seat, and the car's driver sped away. The Crespíns provided law enforcement with a description of the car and its license plate number. Wang's purse contained \$15 or \$20.

Fifteen minutes later, 17-year-old Abel Martínez (Abel) was walking home from school in Orange when he saw a car drive by. Patricia Dennison who was parked at a nearby intersection saw a car with a broken windshield drive by and heard one of the men say, "Stop the vehicle[.]" Three men got out of the car, and the driver traveled down the street, made a U-turn, and parked next to Dennison. Abel heard someone say, "Give me your money[.]" but he ignored the demand and kept walking. Two of the men grabbed Abel's arms and again demanded his money. When Abel replied he had none, one of the men smashed Abel's nose against the man's knee, and Abel fell. Two of the men grabbed Abel's arms and again demanded his money. After Abel repeated he had none, the men took Abel's wallet, backpack, and MP3 player. Dennison heard the

driver yell, ““Let’s go. Hurry up.”” As the men ran to the car, a bystander ran to Abel’s aid, and the men yelled at the man “not to get involved.” The men got into the car, and the car sped away. Dennison later identified Rodriguez as the car’s driver during a photographic line-up.

Based on the car’s license plate number, Officer Matthew Miller arrested Rodriguez at his home. After advising him of his *Miranda*¹ rights, Rodriguez agreed to talk with Miller. Rodriguez told him that he was the driver on both the Anaheim and Orange robberies and “he knew what was going on[,]” and he knew the men “were going to take property from other [people.]” He said some of the property was still in his vehicle. Rodriguez admitted he was an Anaheim Drifters (Drifters) gang member, and stated a rival gang member smashed his car’s windshield with a computer monitor. Officers found Abel’s MP3 player and items belonging to Wang in Rodriguez’s vehicle. Rodriguez led officers to where they could find his confederates: Gabriel Martinez, Raul Hernandez, and Anthony Garcia.

An information charged Rodriguez with second degree robbery of Wang (Pen. Code, §§ 211, 212.5, subd. (c))² (count 1), second degree robbery of Martinez (§§ 211, 212.5, subd. (c)) (count 2), and street terrorism (§ 186.22, subd. (a)) (count 3). The information alleged Rodriguez committed counts 1 and 2 for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). The information also alleged he suffered an October 2005 prior serious and violent felony conviction for violating section 186.22, subdivision (a) (§§ 1170.12, subds. (b) & (c)(1), 667, subds. (a)(1), (d) & (e)(1)).

At trial, the prosecutor offered the testimony of Officer Brian Janocha, a gang expert. After detailing his background, training, and experience, Janocha testified concerning the culture and habits of traditional, generational, turf-oriented Hispanic

¹ *Miranda v. Arizona* (1966) 384 U.S. 436.

² All further statutory references are to the Penal Code.

criminal street gangs. He also testified regarding how one joins and leaves a gang, the use of monikers in gangs, and the significance of tattoos in gangs. He explained the importance of violence and respect in gangs, and that gang members boast about the crimes they commit to gain respect. He said, “the more brazen or violent the crime, the more respect they’re going to earn among other gang members.” He stated gang members are expected to back up other gang members, and typically, gang members commit crimes with fellow gang members, and not with non-gang members because of a lack of trust with the non-gang member. He said it is common for gang members to commit a series of crimes throughout the day and for gang members to act as the back up. Janocha opined “any robbery will benefit a street gang[]” because the “money and property . . . is expected to be shared among the gang.” He said gang members will use robbery proceeds to put gas in a car to commit more crime or drive to rival’s territory to challenge enemies, or to buy a gun. He also stated gang members will commit crimes where the opportunity presents itself, not just in their own claimed territory. With regard to gang membership, Janocha explained it was common for active gang members to deny membership to avoid the criminal gang laws. He would not be convinced a person left the gang unless that person was “jumped out” of the gang.

After the parties stipulated the Drifters were a criminal street gang as statutorily defined, Janocha stated the Drifters’ primary activities were automobile theft and robbery and it had between 20 and 25 members. Janocha explained he and other gang investigators had the following prior contacts with Rodriguez: (1) on August 8, 2004, a gang investigator contacted Rodriguez with two other Drifters gang members, one of whom had “AD,” Anaheim Drifters tattooed on his arm, and Rodriguez stated he associated with the Drifters; (2) on August 19, 2004, Janocha contacted Rodriguez with two Drifters gang members after a gang-related fight where he had shot himself in the foot with a gun he obtained from another gang member; (3) in April 2005, Janocha contacted Rodriguez concerning a robbery where he was in a car with other Drifters gang

members and one of them had a sawed-off rifle that was obtained from another Drifters gang member; during an interview, Rodriguez claimed “he was trying not to be active[,]” but he still associated with Drifters gang members; and (4) in August 2005, officers arrested Rodriguez for robbery and found gang indicia in his bedroom, and during an interview, he told Janocha he was the driver in the robbery and one of the other men was a Drifters gang member. Janocha stated that in connection with the August 2005 robbery, Rodriguez admitted in court documents he was a member of the Drifters criminal street gang. He did not know Rodriguez’s moniker or whether he had any gang tattoos.

Based on Rodriguez’s admission to Miller he was a Drifters gang member, the fact he was with two other Drifters gang members (Martinez and Hernandez), the fact a rival gang recently vandalized his car, and letters Rodriguez wrote to Martinez, Janocha opined Rodriguez was an active participant in the Drifters at the time of the offense. After testifying the robberies were not committed in Drifters’ claimed territory, Janocha opined “these robberies were going to benefit the Drifters gang.”

On cross-examination, Janocha testified he did not know whether the fourth perpetrator was a gang member. He admitted there was no evidence Abel knew the men were Drifters gang members. Janocha stated the perpetrators would gain respect in the gang, despite the fact they robbed an elderly woman and a young man. On redirect examination, Janocha noted Rodriguez admitted he was a Drifters gang member three months before the robberies.

Rodriguez testified on his own behalf. Rodriguez stated he was a member of the Drifters criminal street gang, but he had not been a member since he got out of jail. He said that when he got out of jail, he tried to avoid his confederates, and he asked his mother to change the telephone number and tell his former comrades he was not home when they came looking for him. He explained, however, that on the day of the robberies, Hernandez asked him if he could take Hernandez to see his probation officer. Because Martinez and Hernandez had been pressuring him to “hang out” with them and

he had been avoiding them, Rodriguez decided to do this “little favor” as a symbol of his friendship and because he was fearful. When he arrived, Martinez was there, and they had been drinking. He knew Hernandez to be a Drifters gang member, but not Martinez. After the three drank some whiskey, Rodriguez drove them to Hernandez’s probation officer. When they returned to Martinez’s, they “hung out” in the alley, and they were joined by Garcia. After getting into a fight with Martinez’s neighbors, whom he did not know to be gang members, Rodriguez, who was on probation and did not want to get into trouble, and the men managed to escape in Rodriguez’s car. As they fled, one of the men threw a monitor at the windshield causing it to break.

After stopping at a convenience store to buy beer, Rodriguez drove towards Martinez’s house to drop them off, but traffic was heavy so Rodriguez drove through a parking lot. When Rodriguez stopped the car to let someone pass, he saw Wang and heard Martinez, who was sitting in the rear driver’s side seat, get out of the car. Rodriguez thought he may be vomiting and looked around to see him, but he could not. When he noticed that Hernandez and Garcia seemed surprised, Rodriguez asked what was happening. They replied, “just go, just go, just go[.]” as Martinez quickly got back into the car. Rodriguez drove away at a normal rate of speed, and the men told him to get on the freeway. On the freeway, Martinez said he took a woman’s purse, and Rodriguez knew he had “to get rid of these guys[.]” but he was afraid of them. Hernandez said they could “hang out” with some girls he knew, and Rodriguez thought it was a perfect “opportunity [to] get rid of them” without angering them. He did not call the police because they were capable of being violent, and he was afraid they would retaliate against him. Rodriguez exited the freeway in Orange and the men said they needed to use the restroom.

Rodriguez stopped in a residential area, the men got out of the car, and Rodriguez drove and made a U-turn. He considered abandoning the men, but he was afraid. When the men got back into the car, they were yelling at him to leave. When he

got back on the freeway, the men told Rodriguez what they had done. Rodriguez never saw Abel, did not know what his companions were doing, and did not tell them to quickly get into the car. Rodriguez drove to Hernandez's aunt's house in Indio, and despite an offer to spend the night, he stayed for 10 minutes and drove to his girlfriend's house. He did not call the police because that was not "an option for [him]."

On cross-examination, when the prosecutor asked Rodriguez whether he remembered testifying the men were capable of violence, Rodriguez stated he remembered. When the prosecutor asked him whether that was because "[he] knew them to be gang members," he responded, "yes." Rodriguez claimed his actions were motivated solely by fear. He testified that in October 2005, he was convicted of a felony in which he admitted to being an active participant in the Drifters and he knew the gang to engage in a pattern of criminal gang activity.

Rodriguez also offered the testimony of his girlfriend, Georgina Nolasco. She testified that weeks after he finished serving his sentence for his October 2005 conviction and one week before the robberies, Rodriguez was worried about his future and how he was going to get out of the gang.

After the jury convicted Rodriguez of all counts, the trial court found he suffered a prior serious and violent felony conviction. The court sentenced him to a total term of 23 years in prison.

DISCUSSION

I. Sufficiency of the evidence-Street terrorism enhancement

Rodriguez argues insufficient evidence supports the jury's finding he committed counts 1 and 2 for the benefit of the Drifters. We disagree.

““To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable

doubt.”” [Citations.] ““If the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.”” [Citations.] The standard of review is the same when the prosecution relies mainly on circumstantial evidence. [Citation.]” (*People v. Valdez* (2004) 32 Cal.4th 73, 104.)

Section 186.22, subdivision (b)(1), increases the punishment for “any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members” In cases where gang offenses and enhancements are alleged, expert testimony regarding the culture, habits, and psychology of gangs is generally permissible because these subjects are ““sufficiently beyond common experience that the opinion of an expert would assist the trier of fact. [Citations.]” [Citation.]’ [Citation.]” (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 656.) For example, an expert may properly testify concerning the “motivation for a particular crime” and “whether and how a crime was committed to benefit or promote a gang[.]” (*Id.* at pp. 656-657.)

““The crime itself must have some connection with the activities of a gang, which we conclude means a “criminal street gang”’ [Citation.] Based on section 186.22, a crime fails to be ‘gang related’ unless appellant committed it ““for the benefit of, at the direction of, or in association with’ a street gang.”” [Citation.] [M]embership alone does not prove a specific intent to use the knife to promote, further, or assist in criminal conduct by gang members. [Citation.]” (*In re Frank S.* (2006) 141 Cal.App.4th 1192, 1199 (*Frank S.*)).

It is telling Rodriguez does not contest his conviction for street terrorism and by not doing so, he concedes there was sufficient evidence he was an active participant in the Drifters criminal street gang, he knew Drifters gang members engage in

or have engaged in a pattern of criminal gang activity, and he willfully promoted, furthered, or assisted Drifters gang members felonious criminal conduct. (*People v. Robles* (2000) 23 Cal.4th 1106, 1115.)

Evidence of the circumstances of the offense and Janocha's testimony provided sufficient circumstantial evidence the robberies were committed for the benefit of a criminal street gang. Shortly after the robberies, Rodriguez told Miller he was the driver on both the Anaheim and Orange robberies and "he knew what was going on[.]" and he knew the men "were going to take property from other [people.]" Rodriguez admitted he was a member of the Drifters, and stated a rival gang member had vandalized his car.

Janocha testified a robbery will benefit a gang because the money will be shared amongst the gang and will be used to fund further criminal enterprises. He explained gang members typically commit a series of crimes throughout the day, and gang members are expected to back up fellow gang members. In the Anaheim robbery, Rodriguez drove the car and Martinez stole Wang's purse, while Hernandez and Garcia remained in the car presumably because Wang posed no real threat. In the Orange robbery, Rodriguez again drove the car, while all three men got out of the car because presumably Abel posed more of a challenge. Although the men committed the robberies in January, at dusk, the robberies were brazen as one was in a busy parking lot and the other on a busy city street. Janocha explained the more brazen or violent the crime, the more a gang member would earn respect among fellow gang members.

Rodriguez cites to the following to support his assertion there was no evidence to support a true finding on the street terrorism enhancement: the true finding conflicts with the prosecutor's argument Rodriguez conspired to commit the crimes to repair his damaged windshield; there was no evidence he had any gang tattoos; there was no evidence Garcia was a Drifters gang member; there was no evidence the perpetrators

shared the robbery proceeds with other gang members or used the proceeds to benefit the Drifters; and there was no evidence the perpetrators bragged about the crimes.

The simple answer to all this is it is not our role to reweigh the evidence, which is what Rodriguez invites us to do. With respect to the prosecutor's argument, the fact Rodriguez may have wanted to use some of the robbery proceeds to repair his damaged windshield does not negate the fact he also intended to benefit the Drifters. As to whether Rodriguez had gang tattoos or whether Garcia was a gang member, Janocha responded he did not know, not that Rodriguez did not or Garcia was not. And despite Rodriguez's earlier testimony he did not know whether Garcia was a gang member, and his strong protestations in his reply brief he did not know, on cross-examination Rodriguez did say he knew all three of the men to be capable of violence because they were gang members. It was for the jury to decide which version to believe. It is true the men did not claim gang membership or yell gang names during the robberies, but that does not negate the other evidence supporting the conclusion the robberies were gang related as detailed more fully above. And Janocha explained that gang members do not limit their criminal activities to their own claimed territory. They take their victims where they can find them. The fact the victims were not gang rivals does not mean the robberies did not benefit the gang. Lastly, that there was no evidence the perpetrators shared the robbery proceeds or boasted about their crimes goes to the believability of Janocha's testimony, which the jury apparently found convincing.

Rodriguez suggests it is notable Janocha did not testify the robberies were committed "'at the direction of, or in association with' a criminal street gang." After having testified the robberies benefitted a criminal street gang, it was unnecessary to also testify they were committed at the direction of or in association with a criminal street gang as section 186.22, subdivision (b)(1), is phrased in the disjunctive.

Finally, Rodriguez's reliance on *Frank S.*, *supra*, 141 Cal.App.4th 1192, is misplaced. In *Frank S.*, the court explained insufficient evidence supported the juvenile

court's finding the minor possessed a dirk or dagger for the benefit of a criminal street gang because the minor's criminal history and gang affiliations alone cannot support a finding the crime was gang related. (*Id.* at pp. 1194-1195, 1199.) As we explain above, here, there was evidence Rodriguez was in the company of at least two other gang members acting as the getaway driver while his confederates committed two robberies 15 minutes apart in two different cities. This was sufficient evidence buttressing Janocha's opinion the robberies were committed to benefit a criminal street gang to continue its reign of terror. Contrary to Rodriguez's assertion, the evidence supports the conclusion this was not a "frolic and detour unrelated to the gang." (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1197-1198.) Therefore, there was sufficient evidence the robberies were committed for the benefit of a criminal street gang.

II. Expert opinion

Rodriguez contends the trial court erroneously admitted Janocha's testimony the robberies were committed for the benefit of a criminal street gang because there was no factual support for his opinion. As we explain above, there was ample factual support for Janocha's opinion the robberies benefitted a criminal street gang, and therefore, the court properly admitted this testimony.

III. Prosecutorial misconduct

Rodriguez asserts the prosecutor committed misconduct when she questioned him about his employment status and relied on the fact he was unemployed during closing argument. He also complains his defense counsel's failure to object constituted ineffective assistance of counsel. The Attorney General contends Rodriguez forfeited appellate review of this issue because he did not object and request an admonition, and his defense counsel was not deficient for failing to object and he was not prejudiced by the evidence or the prosecutor's argument. As we explain below, Rodriguez waived appellate review of this claim, and he was not prejudiced.

“‘In order to preserve a claim of [prosecutorial] misconduct, a defendant must make a timely objection and request an admonition; only if an admonition would not have cured the harm is the claim of misconduct preserved for review. [Citation.]’ [Citation.]” (*People v. Parson* (2008) 44 Cal.4th 332, 359.) Here, Rodriguez’s defense counsel did not object to the prosecutor’s questions concerning why Rodriguez was loitering in the alley instead of looking for a job, or her closing argument he robbed the victims to repair his car’s windshield. Therefore, his claim is waived, and we will address his contention he received ineffective assistance of counsel.

During the prosecutor’s case-in-chief, Maria Crespín, Dennison, and Miller all testified the robbers’ car had a cracked windshield. Relying on the fact witnesses obtained the car’s license plate number and further description of the car was, therefore, unnecessary, Rodriguez argues the prosecutor elicited evidence of the broken windshield to establish a motive for robberies because the evidence had already established he was driving his car.

The prosecutor’s questions to the witnesses were general inquiries asking them to describe the car. Rodriguez concedes it was his defense counsel who raised the issue of whether he had vehicle insurance that would cover the windshield replacement, although he claims it was in anticipation of the prosecutor arguing repairing the windshield was the motive for the robberies. Indeed, defense counsel also asked Miller if he determined whether the vehicle was insured.

It is true the prosecutor suggested that instead of hanging out in the alley with his friends he could have been doing something constructive like looking for a job. It is also true the prosecutor asked Rodriguez whether he made a claim for insurance to repair the windshield. But it was not until later, when discussing the jury instructions, that the prosecutor indicated she “believe[d] there [was] an additional motive . . . which . . . [was] replacing the windshield.”

During closing argument the prosecutor stated: “[H]e has the motive, if you think about it here. Not only is there the gang motive, which is the whole fear and intimidation of picking on random citizens out there in Orange County and intimidating random citizens, but he’s also got the motive of needing to replace his windshield. We know now that there was a rival gang attack earlier that day, . . . his windshield got smashed, he doesn’t take the car home to his father because he’s trying to work out a way to get it repaired and replaced. And what better way to do that than pick on the citizens of Orange County, rob a couple of them, hope to get away with a few bucks, and get the windshield replaced?” A little later, the prosecutor added Rodriguez was the one with the most motive to commit the robberies because “he’s the one who needs to replace the windshield. And who better to help him out but his home boys?” And during rebuttal argument, the prosecutor stated, “Why isn’t he, at a minimum, at home taking care of his three[]year old, or perhaps, out looking for a job? Why isn’t he out looking for a job? Why isn’t he doing something productive? He’s hanging around in alleys.”

“If defendant fails to show that he was prejudiced by counsel’s performance, we may reject his ineffective assistance claim without determining whether counsel’s performance was inadequate. [Citation.]” (*People v. Sanchez* (1995) 12 Cal.4th 1, 40-41, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Here, Rodriguez suffered no prejudice because it is not reasonably probable the result of the proceeding would have been different had his counsel objected to the complained of statements. Rodriguez admitted to Miller he was the driver in both robberies and he knew what his confederates planned to do. At trial, he testified he drove the car in both robberies, although he claimed he did not know what was going on. But this latter point was contradicted by Dennison’s testimony that during the Abel robbery, she heard Rodriguez yell at the men, ““Let’s go. Hurry up.”” And officers found the contraband from the robberies in his car. Therefore, Rodriguez was not prejudiced by the prosecutor’s questions regarding why he was loitering in the alley

instead of looking for a job, or by her closing argument he robbed the victims to repair his car's windshield. Accordingly, we reject his ineffective assistance of counsel claim.

DISPOSITION

The judgment is affirmed.

O'LEARY, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

FYBEL, J.